UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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IN RE GOOGLE ADVERTISING
ANTITRUST LITIGATION 21 MD 3010 (PKC)

Argument

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New York, N.Y.
August 31, 2022
2:00 p.m.

Before:

HON. P. KEVIN CASTEL

District Judge

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(In open court; case called)

THE COURT: If you are more than three feet away from the person next to you, and you're seated in the well, and you're fully vaccinated, according to the rules that I'm required to follow, you're permitted, but not required, to take off your face masks.

So appearing for the plaintiffs, please.

MR. KELLER: Your Honor, would you like us to stay

seated?

THE COURT: Yes, that's the protocol.

MR. KELLER: Thank you. I'm Ashely Keller for the plaintiff states.

MR. ZWEIG: Jason Zweig, your Honor, for the plaintiff states.

MR. LANIER: Mark Lanier for the plaintiff states.

MS. SMITH: Brooke Smith for the plaintiff states.

THE COURT: You might get the microphone a little bit closer to you. You'll find that will work better.

And appearing for the defendants.

MR. MAHR: Good afternoon, your Honor. Eric Maher with my partner Andrew Ewalt, Justina Sessions from the Wilson Sonsini firm.

MR. ORSINI: Good afternoon, your Honor. Kevin Orsini from Cravath on behalf of Meta.

THE COURT: Anyone else making an appearance, we might as well get the appearances from those who are not directly involved in the motion but are parties to the MDL.

So starting with Mr. Boies.

MR. BOIES: David Boies, your Honor, Boies Schiller & Flexner representing the advertising class.

MS. VASH: Good afternoon, your Honor. Serina Vash from the law firm of Herman & Jones representing the individual newspaper plaintiffs.

THE COURT: Good to see you, Ms. Vash.

Who else?

MR. THORNE: John Thorne representing Associated Newspaper.

MR. ELIAS: Good afternoon, your Honor. Jordan Elias with the Girard Sharp firm for advertising plaintiffs and the proposed advertising class.

MR. RUBIN: Jonathan Rubin, MoginRubin LLP for the advertising class, your Honor.

THE COURT: Anybody else? Any counsel in the MDL who wants to make an appearance, please identify yourself.

MR. KELSTON: Henry Kelston, K-E-L-S-T-O-N from Adhoot Wolfson also for the advertising plaintiffs.

THE COURT: Thank you, sir.

Anybody else? Yes, ma'am.

MS. HERMES: Jennifer Hermes, H-E-R-M-E-S of Zwerling Schachter & Zwerling, also for the advertising plaintiffs.

THE COURT: All right. Wonderful. Apologies for dragging you all off the beach. I'm sure you were all luxuriating and had to fly in last night, and I'm sure you flipped through your papers before you got here.

So, I'm going to give you time at the end of today to say whatever you want to say for pretty much a reasonable period of time. I will give you some time to make your thoughts known, but I'd like to start off at least with a

number of questions that I have or points that I want to get confirmed which will be of help to me, and then we can proceed from there.

So, first of all, let's talk about what 12(b)(6) is all about and the fact that a defendant moving under 12(b)(6) gets to select the grounds on which they're moving. They're not required to raise every defense that they may wish to raise in an answer or deny everything that they wanted to put in an answer if they file an answer some day, but they pick the issues they move on.

And with regard to this complaint as I read it, there are certain points that the defendants have not focused their motion on or raised in their motion. In essence, they conceded for the purpose of the motion, solely for the purpose of the motion, but they conceded for the purpose of the motion.

So, it seems to me that the states have alleged six distinct geographic and product markets, and I do not see Google challenging the existence of these geographic or product markets for the purposes of their motion. And when I say product markets, we could have a debate some day are they products, are they services. We'll call them product markets. And they are publisher ad servers, ad exchanges, ad buying tools for large advertisers, ad buying tools for small advertisers, in app mediation tools and in app networks. Those are the six markets that the plaintiff has alleged, and I don't

see Google challenging them.

Am I correct that Google for the purposes of this motion does not challenge the existence of these separate and distinct markets?

MR. MAHR: You're correct, your Honor.

THE COURT: And am I correct that there are these six markets and none other that are relevant to the plaintiffs' claim?

MR. KELLER: Yes, your Honor.

THE COURT: Now, it seems to me that Google has not for the purpose of this motion challenged the existence of monopoly power in the ad server market and the ad buying tools for small advertisers market. Is that accurate?

MR. MAHR: It's hard to say, your Honor, but it is accurate we concede for purposes of this motion to dismiss only.

THE COURT: And in terms of for the purposes of the Section 2 claim, Google does not dispute that the plaintiffs have plausibly alleged specific intent to monopolize and at least a dangerous probability of acquiring monopoly power in ad exchanges and ad buying tools for large advertisers.

MR. MAHR: That one, your Honor, I don't think I can concede. I don't think we concede specific intent. We may not have had room to have a specific section on specific intent, but certainly we don't believe that the complaint has anything

more than broad allegations of intent to monopolize.

THE COURT: Well, I'm a creature of paper here, and I have a pleading, and I have the four corners of that pleading and anything that is legitimately incorporated into that pleading, and then I have your motion.

Now, your motion says a lot of things. For example, it challenges the existence of anticompetitive conduct on a variety of grounds. It argues that Project Sandbox is not ripe. It argues that other conduct has been discontinued and can't form the basis for injunctive relief. It argues that laches bars much of the complaint, but I don't see -- and I'm all ears, all eyes -- I don't see where there is a challenge that the plaintiffs have failed to plausibly allege specific intent for the purpose of the attempt to monopolize claim.

MR. MAHR: I think you're right. I just wanted to make the point about we do have some disputes over intent as it relates to conduct but not -- I agree with what you've said.

THE COURT: All right. Good.

Now, as I read it, for the purposes of the -- I guess it's the Section 1 claim, you dispute the existence of market power in inapt networks and also for the purposes of the Section 2 claim, you dispute the existence of monopoly power in the ad exchange market. That's the way I read your brief for the purposes of the Section 2 claim. Is that accurate?

MR. MAHR: That's accurate, your Honor.

THE COURT: Okay. Now, does the plaintiff take issue with what I just outlined in terms of what the defendant has conceded and has disputed?

MR. KELLER: We don't take issue perhaps with the exception of whether you can challenge market power initially in a footnote and then bring it up in reply, but to the extent that your Honor thinks that they've adequately preserved it or prepared to join the issue, I will answer any other questions you have.

THE COURT: A fair point. Fair point. I saw that and wasn't surprised.

Now, a question that I have just about the market for ad exchanges, now you've done a pretty good job in your complaint of explaining what header bidding was, but when I get deep in the complaint and I'm around paragraph 370 or so, there's a new term that's introduced for the first time and that's header bidding exchanges. Where do I find what a header bidding exchange is, and how does that differ from simply header bidding?

MR. KELLER: I assume that's us, your Honor.

You're right. It's not a separately defined term. What the concept is getting at is header bidding is a new disruptive technology that's outlined in the complaint, and header bidding exchanges are competitive exchanges to Google's AdX exchange that support the header bidding technology. So

these are other exchanges that are utilizing this service, this new disruptive technology to communicate bid and ask for impressions.

THE COURT: So they are not merely publishers who are using header bidding, but they are exchanges, and they exist as a marketplace, if you will, and part of in competition with AdX and as part of the ad exchange market.

MR. KELLER: Yes, your Honor. Publishers do use header bidding exchanges, but the exchanges are the ones that are competing with AdX, that is correct.

THE COURT: Okay. So what I want to do is I want to go through some of the, as I get it, I think I cataloged -- and there are different ways to do the numbering, 13 anticompetitive categories unless you want to count the bell variation of Bernanke and global Bernanke as two other strategies, in which event it balloons up to 15, but it's somewhere in that neighborhood.

MR. KELLER: Your count and mine are the same, your Honor.

THE COURT: So now what the mission is for the Court on the Section 2 claims is to see whether or not, for example, let's take the monopolization claim to begin with, whether or not if there is monopoly power in the ad server market, if it has been plausibly alleged, then I'm looking to see whether -- not just in isolation but taken as a whole, looking at it as an

individual component but then looking at it in a broader context, anticompetitive conduct directed towards the ad exchange market has been alleged, plausibly alleged.

Now, I have to think about the laches argument, for example, but putting laches aside for a moment and any ripeness issue aside for a moment, if I conclude that there is anticompetitive conduct directed to that market, then the complaint states a claim for relief for monopolization of that market. Is that accurate?

MR. KELLER: From the plaintiff's perspective, yes, it is, your Honor.

THE COURT: From the defendant's perspective?

MR. MAHR: Ours as well, your Honor. We are challenging the anticompetitive content.

THE COURT: Understood. But when we talk about the anticompetitive conduct -- and, again, these are some of the preliminaries issues I want to get out of the way -- it must be directed towards and analyzed with respect to a specific market. It's not anticompetitive in the abstract; it's anticompetitive in a particular market. Whether it's ad buying tools for small advertisers or publisher ad servers, it's got to be anticompetitive conduct directed to a particular market. And, therefore, my job as to these 13 or 15 categories is not merely to say no or yes, it's anticompetitive conduct, but is it anticompetitive conduct in one of the alleged markets; and,

if so, which one, all right? Because it may be as to one market and not as to another. Am I right on that?

MR. KELLER: Yes. An unqualified yes. The only thing that I would add, your Honor, is that Google we allege utilized market power in one market, for example, the ad server. And that market power and misbehavior that we document could be directed at more than one market, so both the server and the exchange, but I don't think that's inconsistent with anything you just said.

THE COURT: Well, I would amend what I said to include that possibility. It's not pick one. It could be three, but it must be analyzed for each market. Agreed?

MR. MAHR: We agree, your Honor.

THE COURT: So I'm not looking for sympathy here, but that's potentially 45 different analyses here as to the anticompetitive acts, and that's not counting your Count Three and your Count Four, so -- but that's what the exercise is about.

Now, when I look at whether conduct is anticompetitive directed to a particular market, if it's, for example, the ad server market, I'm not looking necessarily at whether it's anticompetitive conduct directed towards publishers because that's not a market that's alleged in the Section 2 claims. I'm looking whether it's anticompetitive conduct directed to the ad server market, and there I'm looking at its potential or

its tendency to harm competition between and among ad servers; not whether it's hurtful to publishers or hurtful to advertisers. And the same principle would apply as to ad buying tools, and the same principle would apply to ad exchanges. Correct?

MR. KELLER: On that one, your Honor, we have perhaps a little bit of a disagreement. I agree with the first part that you're looking at the relevant product market, as we defined it, as masters of our complaint. And so, to take your Honor's example, anticompetitive conduct directed to ad servers, you have to look at the ad server market, and publishers are not a defined market.

Harm to publishers though can still be relevant in your consideration of whether Google has harmed the ad server market in an anticompetitive way, which makes sense because publishers are the customers who purchase ad servers. So looking at what happened to publishers shouldn't be wiped away from your mind, but you're right that that's not the market. The publisher market is not the market that we define as the one that Google monopolized in Section 2 or attempted to monopolize under Section 2

THE COURT: I agree. So you look at what the conduct did which may have influenced the actions of a publisher, which may in turn have caused the competitive harm, not even just in the ad server market but might be in the ad exchange market,

for example.

MR. KELLER: Yes, exactly.

THE COURT: I got that part.

Conceptually, is there a disagreement on that point?

MR. MAHR: There is not. The harm has to take place on the market alleged, as you initially said.

THE COURT: Well, this is good. And I guess what I'd like to hear is -- and I'm going to take this a little bit out of order. We are going to go through the alleged anticompetitive conduct, and that's going to take some time. So let me turn to something that's maybe a little bit more discrete, and with regard to the Section 1 claim relating to the tying between the Google ad server and the Google ad exchange between, I guess, DFP and AdX. I want to hear from the defendant briefly if you'd like to address that.

MR. MAHR: Thank you, your Honor.

With respect to the tying claim, we think there are two key points. One, that there is no dispute here that the tying and tie products alleged in the complaint are, as you just said, DFP ad server and AdX; and that AdX is the tying product and DFP is the tied product.

I don't think there is also any dispute that an essential element of a tying claim, as you've recognized in the *Time Warner* case and the Second Circuit has in *Unijax* is actual coercion. And I think there's agreement between the sides on

that.

Plaintiffs tried to meet that standard in two ways: One, arguing a contractual tie, and one arguing economic coercion. Both fail.

As to the contractual tie, plaintiffs themselves allege that Google offered an exchange only contract until 2018, so the fact that you could license the exchange only or DFP only up through 2018 eliminates any hope of actual coercion under *Unijax*.

THE COURT: They flipped that one on you, is my recollection, and they say that shows that they're truly distinctive products; that they can be sold separately. And then they say -- and, listen, I understand what complaints and pleadings and what it's like to be in a situation that the party making the allegation is bound by their allegation, and you're bound by it, they use the word require; that Google required users of one product to use the other, and they moved everyone over to a combined contract. They paint a picture in their complaint of a lack of freedom of movement to do.

Now, it may be the position that's not plausibly alleged or it's not relevant. Go ahead, just tell me.

MR. MAHR: That is the position. I just wanted to clear out prior to 2018. In 2018, they say they use this contract, but I think it's really important to look at the allegation in paragraph 251. They say that Google required

customers to use a contract that included both AdX and DFP. That verb "included" is critical, and I think it's also fatal to their coercion claim. And I don't think we can kind of just gloss over and say, oh, one verb and the other verb.

The contract after 2018 does include the option of buying either or both. But merely including two products in the same contract is not the same as coercing it. And the fact that they recognize that by using the word included is important. And I don't think we can -- in some cases, you might let them off and say, oh, it's just a verb here, but this is a case where they're on their fourth complaint. They've had a number of these contracts for many years now. We've specifically identified this argument in our premotion letter. Then they also saw our motion itself which raised this issue. You gave them another chance to amend. They said no, we're sticking with included. I think in that situation we have to assume that they knew what they meant when they wrote included. And if they had contracts that they could put a provision of the contract into the complaint that says, "Publisher, you're required to buy both of these; you may not buy one or the other," they would have put that in. They have those contracts. They don't say that, and they didn't plead it, and I think that is important. So I don't think you can just say including them together is actual coercion. Lots of reasons to do that.

THE COURT: All right. Let me hear from the plaintiffs.

MR. KELLER: Thank you, your Honor. I'll start with 2018, and then I'll go back to the previous conduct that we still think alleges an unlawful tie.

Look at the last sentence of paragraph 251, which my friend just referenced.

"With this strict contractual tie, Google no longer even attempts to maintain the fiction that its exchange and ad server may be purchased separately."

If you're drawing all reasonable inferences in our favor and reading the well-pleaded complaint accepting the facts as true, I think we've alleged a tie there where you can't purchase the two products separately. And as we've already talked about, there is no dispute that they are in fact two separate products and two separate markets.

So I think from 2018 on, drawing inferences the way you're supposed to on a 12(b)(6), we prevail. That's not a conclusory allegation. That's saying as a factual matter, they are not available separately. Maybe they will prove that wrong with actual contracts that they put forward on a Rule 56, but my friend is not correct that we have to reference those in a complaint. We're not held to some higher standard because we've had investigatory time and have collected materials. So applying the normal 12(b)(6) standard, paragraph 251, helps us,

not them.

Let's go back in time. We think that the conduct starting in 2009 when we say that the tie began is still an unlawful tie because, my friend is exactly right, we agree the test in the Second Circuit is coercion, and publishers were absolutely coerced to accepting Google's ad server because if they didn't, they wouldn't get realtime access to bidding information on AdX - that's the tying product - and their revenues would have dropped by 40 percent.

That's pretty strong coercion. It's not a gun to the head, but that's not the level of coercion that's required in the Second Circuit. And I'd point your Honor to the *Texaco* case, where even verbal threats a single time can be enough to coerce a customer into accepting a tie. So, again, drawing reasonable inferences in our favor, that shows that the tie was actionable.

And the final point I'd make is there's no arguing with success. When Google first purchased DoubleClick, it had a little less than half the market. Now there's no dispute. Google has 85, 90 plus percent of the server market. So all of this coercion worked if you draw the allegations in our favor. They're going to want to say it's because we have such a great secret sauce, and we did all of this innovation, and they're going to be entitled to make those points again at a later procedural posture. But if you take all of the well-pleaded

facts as true and draw the inferences as you're supposed to in favor of the plaintiffs, the reason that Google grew its market power from roughly half to almost a stranglehold on the entire marketplace is because they engaged in an unlawful tie.

THE COURT: I think we can pause on this. And there is agreement that I review the allegations of the complaint, I hold the plaintiff to those allegations, and I determine whether or not they plausibly allege actual coercion, which both sides agree. And there's case law on what is actual coercion for these purposes, and no one has suggested that it's a gun-to-the-head standard, but it is actual coercion.

So that's really what I need for the purposes of the oral argument. I'll give you an opportunity to very briefly say what you wanted to say, but then we're going to move on to the next topic because I think I know what I need to do.

Go ahead.

MR. MAHR: I just wanted to make a point on the other ground which I didn't get to address -- the economic coercion argument.

THE COURT: Yes.

MR. MAHR: They clearly define the tying and tied products as DFP and AdX, but then they add in, without defining what it means, live competitive bids to augment one or the other sides of the tie. They don't say what live competitive bids is. They don't define the tying product as AdX with live

competitive bids. They don't define the tied product as DFP with live competitive bids.

That's why I think at the end of the day, we think this is nothing more than an argument that will -- two of Google's products work together better with each other than they work with competitive products. And because they can't identify live competitive bids as a second product, that better functionality between two of Google's products on Google's own platform is not enough to convert their tie into actual coercion.

THE COURT: Thank you. I think I know what I need to do to analyze the claim.

Let's talk about the NBA. And, no, it's not basketball. Anyway --

MR. KELLER: It's Star Wars.

THE COURT: It's Star Wars.

So, briefly, I understand the claim with regard to header bidding. And then I wanted to turn to the in app argument under the NBA. But the question is, in essence, or, in reality, there's an allegation here that there are certain beneficial provisions to Facebook in the NBA: Goodies, wonderful things.

And it's alleged that Google was most unhappy, greatly upset, motivated by murderous intent with regard to header bidding. Take your pick. But they didn't like header bidding,

and the allegation is that the NBA was a payoff to Facebook to get it to abandon header bidding. And the question is whether that is plausibly alleged, drawing all inferences in favor of the pleader, or not plausibly alleged.

So with that background, and recognizing that I'm not going to decide these issues today, obviously, Mr. Mahr, I'll give you an opportunity to make your pitch on that, and I'll give the plaintiff the same opportunity

MR. MAHR: Thank you, your Honor.

So this claim is obviously all about an agreement, and that's where we're focused in. The NBA is in fact an agreement. It's just not an unlawful one. There's not even a restraint of competition in it.

The plaintiffs in their complaint suggested some kind of selective cohortation and insinuation there was something nefarious about the NBA. We just gave it to you, and we think it's clear on its face without any factual issues that there is nothing anticompetitive about that. Google can allow Facebook to come on and bid on its platform for free. So the fact that it did under terms that it felt were commercially reasonable isn't of any moment to Section 2.

Having provided you with the contract, and having to face the fact that there is no agreement that restrains competition between Google and Facebook in that agreement, they pivot in their opposition to say, well, of course they didn't

write it down. It must be some kind of secret agreement outside of the four corners of the NBA.

Number one, while that's alleged in their opposition, they can't amend their complaint through their opposition, and their complaint itself has no allegation of this secret agreement outside the four corners of the NBA.

THE COURT: Well, I don't know whether that's literally correct, but anyway, go ahead.

MR. MAHR: Well, I don't think -- I don't know which part you mean.

THE COURT: I mean in terms of -- do they not suggest that this was an agreement favorable to Facebook that Google offered on condition unwritten that Facebook abandon header bidding.

MR. MAHR: That's the part that is completely conclusory and doesn't get close under *Twombly* -- who, what, where, when.

THE COURT: That may be. I'm not going to adjudicate that today, but that is in the allegations purportedly in support of the count.

MR. MAHR: I don't see it in the allegations. We've looked all over where they say there was some agreement outside. They say it in their brief. But even if they say it in their complaint also, and I missed it, they don't say it with anything close to what *Twombly* requires.

THE COURT: Let me give the plaintiffs an opportunity.

MR. KELLER: Thank you, your Honor.

We don't have to separately plead that the agreement was both the written document and what they agreed to in the C-suite because we're talking about the Sherman Antitrust Act which talks about agreements in restraint of trade, and case law already defines the agreement as beyond the four corners of the document.

We agree that they didn't write down exactly what your Honor previously said, which is the way we couch this allegation. They didn't write down: Google will give Mark Zuckerberg a suitcase full of money in exchange for Facebook agreeing to substantially curtail its support of header bidding because no one wants to go to jail and wear an orange jumpsuit.

So they instead documented the way that they were going to transfer wealth to Facebook in exchange for abandoning header bidding through the network bidding agreement. And it's not just a conclusory allegation that that's true -- which I agree, you don't have to accept legal conclusions under *Iqbal* and *Twombly*. The complaint goes through the timing and the statements that were made by executives recognizing, for example, at Facebook that we're going to publicly support header bidding as this new disruptive technology, but privately saying that, you know, competition is hard and then recognizing that Google really doesn't like header bidding and wants it to

go away. And then close in time temporally to that we get the network bidding agreement, which, by the way, Google kept secret from everybody else. It said that all of the advantages that Facebook had nobody actually had, and that it was fair auctions for the in app impressions where everyone is on a level playing field. Not true. Facebook had timing advantages, information advantages, all the things that we document about the network bidding agreement.

So if you take all of those allegations together as true, yes, within the four corners of the document, they were smart enough not to write down their illegal behavior that could have resulted in criminal sanctions, but we are well above the 12(b)(6) line to plausibly allege nefarious misbehavior to kill off a nascent technology that could have disrupted Google's monopolies.

THE COURT: I understand the argument. I'm going to give the movant the last brief word on this, and then we're going to move on.

MR. MAHR: Two points: One, Mr. Keller's statement just now about an agreement in C-suite is more detail about this alleged agreement outside the four corners of the document that isn't anywhere in the third amended complaint.

Number two, the third amended complaint, paragraphs 419, 422, 509, it provides the reason and even explains Facebook was doing an 18-month strategy to appear to have -- to

support header bidding in order to get better terms to what it really wanted, which was access to open bidding. That explanation is in those paragraphs of the complaint.

When the face of the complaint shows perfectly valid independent business justification for the two parties entering into the written agreement, the written agreement itself has nothing unlawful in it, courts don't say, well, they said there might be -- in oral argument they said there might be something in the C-suite without saying who, when, what. How did they even agree to say this written agreement we just entered into that's completely enforceable, that in four different ways preserves Facebook's ability to use competitive technology, that's not really enforceable? How can we defend that when the most we've heard about it now was it was in the C-suite?

THE COURT: Thank you.

So now let's talk about the specific provisions relating to in app markets and the alleged provision that restrains or guarantees, I should say, Facebook a certain win rate in the auction for in app impression.

So let me hear from the defendant on this.

MR. MAHR: Well, again, we don't think there's an agreement, but do you mean the extent to -- the extent to which they --

THE COURT: Well, there is the NBA, and as I see it in the briefing between the parties, the parties on this end of

the motion each are referring to the language of the NBA to support an interpretation.

Now, I think in fairness to the plaintiffs, they say, well, there could also be a wink and a nod here as well, but the principal argument is directed to the language of the NBA. And maybe I didn't read this correctly, but I thought the plaintiff was taking the position that there was a guaranteed win rate. It says ten percent, but it winds up being about 7.2, and then I think you argue it's really more like 4, 3. But the bid and the ask seems to start with the language of the agreement

MR. MAHR: Yeah. Well, I think we think that the language of the agreement, that win rate, is not an agreement not to compete. It's an undertaking to compete; that Facebook has to compete enough in the auction so that it wins about ten percent of those that it bids in.

And there's no court that's found an agreement to compete to be anticompetitive. There's no obligation on the other side of that that Google can't compete or shouldn't compete. Google when they're on that platform together competing --

THE COURT: Well, the plaintiff says, then they shouldn't compete in excess of 92 percent because -- or 90, whatever it is, percent because Facebook is supposed to win its 7.2 percent, and Google ought not be winning more than, I

guess, 93 percent, something like that.

Did I mischaracterize that?

MR. KELLER: No, you have that right.

THE COURT: That's an argument out of their brief.

MR. MAHR: But, again, the obligation is only a basic obligation that if we're going to go into this agreement where we're taking certain measures and putting in play certain systems to get your access to this platform, we want to make sure that you participate on the platform. So we want to make sure that you bid enough to win at least ten percent of the auctions that come your way.

THE COURT: Now, the other argument that I see is there are minimum spend rates for Facebook, and the argument seems to be that, well, if you've agreed with Facebook that they will spend a minimum amount, whatever that is, $1 or a hundred million dollars or $500 million, whatever those numbers are, those are dollars that can't go into header bidding is the argument.

How do you address that? How do you meet that argument?

MR. MAHR: They would have to show that those dollars are substantial foreclosure of Facebook's ability to bid on other exchanges like header bidding exchanges. They haven't shown that. They've shown the numbers.

THE COURT: And the numbers are flashy.

MR. MAHR: The numbers are flashy, maybe not compared to how much Facebook spends on advertising overall. They don't make that determination. We can't just go from big numbers -- ten million might be an enormous number to me.

THE COURT: What about 500 million?

MR. MAHR: Same thing. When you're talking about some of these large companies, 500 million might not be a significant percentage of the spend of the company, and that's what foreclosure is. Foreclosure isn't dollars. Foreclosure is a percentage of the market. Just because the market is -- this is billions of dollars in this market. And just because it's a big market doesn't mean you can take a big number and say that's substantial foreclosure. It's the percentage foreclosed.

Just like in your *Wellnexx* case, you talked about the deal between two parties that closed off 40 percent of the market was not anticompetitive because it was 60 percent for, in this case, header bidding to compete for. We're talking here about ten percent and about whatever percentage the minimum spend requirements are, which plaintiffs don't tell us in their complaint. And so you can't determine whether and we can't determine whether there is substantial foreclosure, which is the question under Section 2.

THE COURT: But you have a little bit of a problem with regard to the NBA in terms of you can -- you feel free and

I understand why, to quote from the actual agreement because the agreement is integral to the plaintiff's allegations, but so can they. That's fair for the plaintiffs to also, once the defendant has come forward with the agreement, for them to also rely on it. And I take the plaintiff's point that the agreement is not necessarily the final agreement with all amendments.

But, anyway, let me hear from the plaintiff.

MR. KELLER: Thank you, your Honor.

I do think that with respect to the conduct we're talking about here, we're relying mostly on the four corners of the written document as opposed to the winks and the nods that we were talking about previously.

But a couple of things. My friend equivocated a little bit, perhaps unintentionally, where he said we want Facebook to participate in the auctions, but the minimum bid percentage is not about participation. Google could have said we're going to give you all these secret information advantages. We're going to let you have better timing so that you have longer to bid through your network on these impressions without setting a minimum win percentage. Once you start doing that -- and let's, of course, recall, in this market, Google and Facebook are direct competitors. They're both bidding on the same impression, along with others who don't have the same information, speed and other advantages

because Google concealed that from the other participants in this market.

But once you have that dynamic whether directly bidding against each other, setting a minimum percentage that Facebook has to win, which is just one minus the number that Google has to win, encourages both sides to bid lower. That's the only reason economically that you would put that sort of percentage into the written document against two competitors.

So it's pretty classic bid rigging just applied to a new technological context, and that's certainly the most plausible inference that you can draw on a 12(b)(6). They say that there are pro competitive reasons for it, but getting Facebook to participate in the auction, I could see that being pro competitive. Setting the minimum amount that Facebook has to win, that's not pro competition any more. That's just depressing bids where two competitors know "I should probably lay off this one because Facebook hasn't hit its minimum yet and they're going to bid harder. I'll stand back."

And once they have hit the threshold, Facebook starts thinking, "I've already hit my minimum threshold. Google is probably going to win this one. I don't need to bid as aggressively." That's classic depressing of prices in an auction market. And, again, on a 12(b)(6), I think we're comfortably over the relevant line.

I think that your Honor has it exactly right, that the

minimum speed and all of the other advantages is basically the way or the minimum spend, excuse me, that was required of Facebook is the way to take Facebook out of the header bidding market. You're right that the numbers are significant. It's not ten million. It's orders of magnitude more than that. And, again, the proof is in the pudding. The complaint alleges that Facebook substantially reduced its supportive header bidding and is no longer participating nearly as much with that technology.

And so when we go the extra step of pleading, and it worked, I think, again, on a motion to dismiss drawing inferences in our favor, it's fair to say that the minimum spend was a mechanism to lock Facebook in into Google's products so that it wouldn't support header bidding as it previously said it was going to do.

THE COURT: Thank you.

Mr. Mahr.

MR. MAHR: I think Mr. Keller is jumping back and forth between the minimum spend and the win rate, but with respect to the win rate, he said it would be pro competitive if it was an agreement to make sure Facebook bid. Well, having Facebook bid if they only bid one penny for each auction doesn't serve Google's goals as the party running the auction. Remember, this is a vertical contract between Google running the auction and Facebook bidding on the auction.

The benefit that the complaint itself recognizes is that Facebook brings millions of advertisers in demand onto our bidding platform. And we can tell our publisher clients come to Google's open bidding because we not only have Google ads, we not only have all these other sources of demand, but we now have Facebook demand on it. Facebook come on and bid a penny wouldn't accomplish that. We needed them to bid hard. That's why it's so kind of upside down that plaintiffs are challenging agreement -- Google's -- Facebook's obligation to compete hard.

Number two, Google doesn't benefit from Facebook winning. Google gets a penalty paid to it if Facebook doesn't meet its win rate. So Google has no reason to lay off. If anything -- and I don't think there's any basis for this -- if anything, that would make Google bid harder because not only did they get the inventory, but Facebook doesn't make its number and has to pay a penalty.

THE COURT: All right. I will bear down on the agreement and the allegations of the complaint. But I'm going to suggest we move on from there.

So let's talk now, we'll get into the catalog of alleged anticompetitive behavior. You're allowed to look at your notes because, as you know from spending time with this, there are certain subtle distinctions between some of the strategies and, you know, I admire Mr. Keller and Mr. Mahr if their heads were not spinning while they were reading or

writing this, but, anyway, let's talk about unencrypted user IDs.

Mr. Mahr and Mr. Keller, I think you've done good jobs on all of this in laying out your arguments, and it's refreshing to have you in today and to hear from you because it reinforces what a good job you've all done on your briefing. So this is good. But, Mr. Mahr and Mr. Keller, I'm going to be familiar with what you're going to say, but I'm going to give you a chance to briefly say it anyway.

Mr. Mahr.

MR. MAHR: So, I think, first of all, there was a lot of people other than me writing that brief, and I want to make sure they're recognized too.

THE COURT: I know that.

MR. MAHR: I know you know that, but I couldn't help but say it.

The customer data claims, and it's all of them, I think -- and this plans -- I'm going to say this again and again as we go through each of these categories of behavior. All of the conduct that is alleged is conduct that takes place on Google's platform of ad tech products. So this is all in the very narrow area of like Google Ski Mountain when you get into *Trinko* and *Aspen* and *LinkLine*. This is not Google taking actions on its platform that keep people from dealing with rivals outside in the marketplace. It's just that these affect

the conditions of rivals access to Google's own platform.

This one in particular deals with essentially plaintiffs are asking a duty to deal with customers, a duty to provide customers with the data that they -- that Google develops over the course of serving them so that those customers can then provide it to our rivals.

Google is not under any obligation to deal with its customers in that way any more than if I learn the proclivities and preferences of a particular client and how best to serve them, I have to tell another firm, oh, if you're trying to get their business, here's how they like briefs written, here's how they like cases stats, and those kind of things. That's all that is.

The allegations of the complaint make clear that the data at issue, whether it's the customer ID numbers or any of the other data, is data generated by Google and its tools in the course of people coming using our products.

And Mr. Keller mentioned secret sauce. It's our secret sauce. Our understanding of our customers is part of our secret sauce. We don't have to share that with our customers. We certainly don't have to share that with our customers so they can share it with our rivals.

THE COURT: Mr. Keller.

MR. KELLER: Thank you, your Honor.

So the hashing of IDs is emblematic of lots of other

things we're going to talk about. Hopefully, I won't repeat myself too much.

But look at paragraph 264 of the complaint. This data is owned by the publishers, according to the well-pleaded allegations. You don't have to take my word for it. Paragraph 264 is quoting Google when it was talking to the FTC to explain why the FTC should allow it to close on a DoubleClick transaction. So Google is essentially saying, "Publishers, you can't send the data that you own that you think is crucial, and is crucial, for advertisers to know what they're bidding on to give you the highest possible bids. We're going to hash the IDs unless you will use our products."

(Continued on next page)

THE COURT: Let's just hang on, because I want to make sure I understand this. The statements made to the FTC were at or about the time of the acquisition of DoubleClick.

MR. KELLER: Correct.

THE COURT: All right. And at that point, it was -- I don't know, but reading your pleading, it sounded like it was a cookie-based world. Isn't that how it worked? It was unencrypted.

MR. KELLER: Correct, your Honor.

THE COURT: Okay. So it's the publisher that collected the cookie, not Google; correct?

MR. KELLER: Correct. And then provides -- sorry.

THE COURT: So the statement that Google made to the FTC — and you don't dispute this, you embrace it — is totally accurate.

MR. KELLER: I totally embrace that the publishers own this data. And that when Google monopolized the server market, they provided that data to Google to help optimize how they are going to communicate the impressions that they have for sale for advertisers. And then Google took that data that belonged to the publishers and said, You can't share it with advertisers unless you are using a Google platform.

And we just heard that that's Google's secret sauce. Hashing IDs and preventing that information from going from the publisher to the advertiser, that's not technological prowess,

that's not business acumen, that's not historical accident, to quote the *Grinnell* case. That's just nakedly anticompetitive behavior to prevent Google's customers from dealing with rivals.

THE COURT: You say in your complaint -- this is not the defendants' brief, this is in your complaint. You say that Google said this was to enhance user privacy. And you say that was pretext.

MR. KELLER: True.

THE COURT: But the reality is that they took the data of the publisher and they transformed it by encrypting it. "Encrypting" is not my word, that's your word.

MR. KELLER: Also true.

THE COURT: And so then it's being used in connection with auctions on AdX. And I guess if you're, what, a nonGoogle exchange participating, then you don't have the wherewithal, the ability, to unencrypt. And the disadvantage to that ad exchange that doesn't have the encrypted information as I read it from you is that they run the risk that they could have by John Conner, a user, twice, because maybe John Conner is reading *Field and Stream Magazine* and also *Sports Illustrated*, and maybe you would wind up sending two ads to him.

MR. KELLER: Yes, I think you have that exactly right. And they are preventing the publisher, therefore, from using a rival exchange, unless they are willing to take depressed bids

because of that information asymmetry that you just talked about.

It's not special sauce to encrypt this information; it's utilizing the monopoly that Google has over ad servers over 90 percent market share to tell their customers, the publishers, We're not going to let you send the unencrypted data unless you use us. And then, no problem, we'll make sure that the advertisers know exactly who they are bidding on. That's not innovation; that's not a great Google software engineer who came up with something special. That's just preventing a customer from shopping around and using other competitors. That's exactly the sort of misconduct that Section 2 is looking towards. It's preventing competitors from getting access to what the publishers want to give them.

You would normally think, if someone had a monopoly over just ad servers, they would say, Publishers, do whatever you want. We'll give the information that you want to give to the advertisers, and then we'll charge you the monopoly price for it.

But what Google is doing is it's saying, We've got this monopoly, and we're going to funnel you into our exchange only if you want to get the best prices. No other exchanges will be able to effectively compete. That's not *Aspen Skiing*, that's not *Trinko*, that's preventing customers from shopping their business to competitors which is harming the competitive

process.

THE COURT: Okay. Mr. Mahr.

MR. MAHR: Your Honor, I have to disagree.

If the publishers can provide us with information, they can provide the other competitive exchanges with the information or other ad servers with the information. This isn't a situation where it's a *Lorain Journal*, where we said, If you provide that information to another exchange that you want to search for advertising demand on, you can't deal with us. Not at all.

It's when we have that information, we do something to it, even if it's encrypting it; and then the customers or our rivals want us to then share that information with the rivals. There's no obligation there to share it either with the customers or the rivals after we've done something to it. And if it was just what the publishers gave us and we didn't do anything to it, well, then they could give it to anyone else they wanted also.

MR. KELLER: Can I stay one thing about that?

THE COURT: Sure.

MR. KELLER: I'm sorry to try and steal the last word.

We just heard him say that they could provide it to other ad servers. There are no other ad servers. Google has over 90 percent of the market, 99 percent of large publishers. There's no one else. And the complaint documents in detail why

this particular market is one where publishers only use one server. It doesn't make sense to have more than one server because of the optimization that goes into these auctions that are happening billions of times a day every nanosecond. So there's no one else for them to give it to; it's just Google on the server side.

MR. MAHR: Which, your Honor, takes us to *LinkLine* and *Trinko*. Even an alleged monopolist doesn't have any duty to support its rivals by providing them with this kind of information.

THE COURT: Okay. I have the arguments.

Let's talk about dynamic allocation. And in addition, I want to hear about where this -- what market, if any — and I guess this is a question that the plaintiff will have to get to. Where is it anticompetitive, in what market?

But let me hear from the defendant first as to your pitch as to why it's not anticompetitive conduct at all.

MR. MAHR: It's not anticompetitive conduct at all because dynamic allocation is a feature, one going back a decade, that brought static demand that existed on an ad server and competed that demand with AdX's live bidding, real-time bidding. And so the only time that static -- let me put it this way: That's only increasing the amount of demand for an individual piece of ad inventory. Increasing the amount of demand increases the price that the publisher gets, increases

the monetization the publisher gets, and is a positive thing.

Even if it weren't a positive thing, which it clearly is, it all takes place on Google's ecosystem of ad tech products. And so the idea that because Google allows -- increases the amount of demand for a particular piece of inventory by putting AdX in, doesn't mean it has to let all the competitors in as well.

MR. KELLER: Thank you, your Honor.

This is funneling publisher inventory into AdX, where that's one of the markets that this is foreclosing competition in and allowing Google to win impressions for a penny more than stale bids. And so it's not comparing apples to apples when you put the competitors at a disadvantage in these auctions that are happening so quickly. And you don't explain to publishers that these are the rules of the auction, because if they had known --

THE COURT: This is a world -- let me interrupt. This is a world where other ad exchanges are permitted to bid, right?

MR. KELLER: Correct.

THE COURT: Okay. So they're bidding in a dynamic allocation world. And what you say is Google is looking at the historical average bids and declaring the impression to have been sold if Google's -- is it Google's customer ad buying tool, is that what it is, bids one penny more, is that what

you're alleging or --

MR. KELLER: Yes. So let's take Google as a good example. Imagine that you, your Honor, were looking at a real-time price of Google stock, and it's trading at $100 a share. And a bunch of old 15-minute stale pricing information put in bids for $98. And then you could just come along and say, Well, I know it's already trading at 100. I'll bid 98 and a penny, and you win the auction. Yeah, you've increased the price over those stale bids that aren't competing on a level playing field.

THE COURT: Is this going on before the other exchanges present their bids or is it after they present their bids? How does that work?

MR. KELLER: Dynamic allocation occurs in the server. So it's a manipulation of the auction that's occurring in the server based on historical data, and then funneling the ad impression into Google's exchange. So my understanding is then the other exchanges are being deselected by Google because of that stale information.

THE COURT: So the publisher, of course, under your explanation, never sees what might otherwise have been a higher bid from a rival exchange.

MR. KELLER: That is correct. Google touted this to publishers as increasing their yield and profitability, but it had the opposite effect, according to the complaint.

THE COURT: I think I understand your argument as to the ad exchange market and the impact on competitors in the ad exchange market. But how is this harm to competition in the ad server market or harm to competition in one of the ad buying tools markets?

MR. KELLER: It's in the ad buying tools market in addition to the exchange, because Google's ad buying tools get these privileges when bidding on Google's exchange.

THE COURT: So competitors in the ad buying tool market do not get this. Now, are you contending this is for both small and large or small or large or what are you contending?

MR. KELLER: It's definitely for small, where we allege that Google has market power; but it's also for large, where they don't necessarily have a monopoly.

THE COURT: Right. Okay.

Yes, Mr. Mahr. Go ahead.

MR. MAHR: Sorry, your Honor. If I may, I'll try to simplify this.

There's the static bid in the ad server. The winning bid is $8. Prior dynamic allocation, it went for $8. Through dynamic allocation, Google found a way to say, Hey, we have all this demand over in AdX. Why don't we take this winner and see if we can beat it; see if there's someone else -- and it's not, you know, deciding then. This is all preprogramed. Let's see

if there's an existing willingness to pay more than that $8. If there is, then it goes to that.

THE COURT: But what the complaint is telling me, it may or may not be true, is there is another participant in the ad exchange market that has a bid from an ad buying tool or from somewhere, has a bid that is a higher bid, one higher than the historical bids. And they're ready, willing, and able and desirous of presenting that bid and, if presented, it will be the highest bid. But Google, though, claiming to allow the rival exchange to compete, is pushing them aside and causing the transaction to clear on the basis of a penny more than the historical average bid, without consideration of the higher bid. Right?

MR. MAHR: So that argument is that when Google found a way to get more for the bid, the static bid, by introducing its ad server through dynamic allocation, it shouldn't have been allowed to do that, until it found a way to have the same capability with every other rival ad server.

So you've got this great innovation --

THE COURT: It's not the same way with every other ad server. The other ad server says, Let me just submit a bid. Maybe my bid won't be the highest bid, but if it's the highest bid, then it clears.

MR. MAHR: That all happens now. But this is back in ten years ago, 2007, 2009 when dynamic allocation came around.

And it was just the beginning of taking this static world and bringing it to real time. We figured out how to do it between our static at server and our real-time exchange before we figured out how to do it with everyone else. And we're under no obligation to figure out how to do it with everyone else.

THE COURT: All right.

Speaking of new and improved, how about enhanced dynamic allocation?

MR. MAHR: It's the same thing. It just applies to a broader category of the static demand. It does the same thing but brings in guaranteed demand, and brings it into a situation where it can be compared against real-time bidding in AdX. It's just a little different because you can't judge guaranteed demand just by the price it's willing to pay; you have to also factor in that it's guaranteed. So if you've already made your guarantee amount, well, then you can just treat it as a bid. If you're woefully short of the guaranteed amount, even if that bid is lower, it might win anyway because you need to --

THE COURT: Publisher's price floor.

MR. MAHR: Yes.

THE COURT: Okay.

MR. MAHR: So it's the same idea.

And again, the idea that when Google found a way to introduce real competitive -- real-time bidding from its own ad server to increase the amount that publishers were getting from

the ad server alone, I mean it's on its own ad exchange and introduces real-time bidding to increase the amount of monetization that publishers were getting on the ad server before, the argument that the state attorneys general are making is, Oh, you can't come up with that innovation until you figure out how to do it for all your rivals, too. And that's just not the law under *Trinko*, *LinkLine*, or any case.

THE COURT: All right.

Let me hear from Mr. Keller.

Mr. Keller, one of the things you can straighten out for me is there is a lot of discussion about cherry-picking the higher value ads through enhanced dynamic allocation. And maybe I'm missing why -- I mean, I understand what the consequence of that would be; I understand higher value or big percentage of revenue, but doesn't this -- doesn't what you're describing work equally, whether it's a high impression or a low impression, isn't that it -- is that a *non sequitur*? Please explain that to me.

MR. KELLER: I hope it's not a *non sequitur*. You're right, the one thing I was going to recommend that your Honor take away from the enhanced dynamic allocution is that identification and forcing publishers to put their highest value inventory through AdX.

THE COURT: Where does that come from that it's the highest value they have to put through?

MR. KELLER: From the server.

THE COURT: Yes.

MR. KELLER: The server identifies it, and then essentially forces them to put it on Google's exchange.

The reason it's not a *non sequitur*, your Honor is correct that it would be anticompetitive, whether they did it for the most valuable impressions, the least valuable impressions, or everything in between. But it obviously forecloses more competition on the merits when you take the most valuable inventory that publishers have and force it onto the exchange. You can do more damage with fewer forced impressions, so to speak, when you're taking the highest value ones. And like in a lot of industries, there's an 80/20 rule of thumb where your most valuable 20 percent of impressions produce the lion's share of your revenue. And so zeroing in on that is a way to make it seem like you're not necessarily engaged in that much foreclosure of competition, but you really are, because you focused on the inventory that matters most to the publishers and therefore to the advertisers.

THE COURT: So how is competition in, let's say, ad tools affected by this, if at all? It may not be your allegation, but --

MR. KELLER: The answer is similar to the garden variety, as opposed to the enhanced dynamic allocation, the advantage that the bidding tools get. And telling the

publishers that AdX is the only way that you're going to get access to the must-have Google Ads small buyer purchases from advertisers. Google Ads is the small buying tool.

THE COURT: But can you not participate on AdX if you use a nonGoogle ad buying tool?

MR. KELLER: You can participate on AdX, but not on the same auction terms. There are privileges that Google gives to its own buying tools.

THE COURT: How does that factor in specifically here with this item -- if you want to go back to dynamic allocation, either dynamic or enhanced dynamic, how does any restriction on the ad buying tools -- or how does that factor in?

MR. KELLER: You've got to use the exchange. But in terms of the ad buying tools, the access to Google Ads purchasers is part of the way that publishers are forced to put their inventory on AdX.

THE COURT: You'll have to forgive me. Maybe it's the hour, but I'm getting a little lost here.

So rival exchanges can participate, in addition to AdX, right?

MR. KELLER: To bid on publisher inventory?

THE COURT: Yes.

MR. KELLER: Yes.

THE COURT: And rival ad buying tools for large and small advertisers can also participate, right?

MR. KELLER: On AdX?

THE COURT: On AdX.

MR. KELLER: Or just for the publisher inventory?

Yes.

THE COURT: All right. And so where is the -- now, you're going to say that the way this is set up, those in the ad server market, it's hurting competition because AdX keeps winning these auctions the way they have it structured to the detriment of competition in the ad server market.

MR. KELLER: Correct.

THE COURT: I'm not saying I'm buying anything here today, I'm window shopping everything, but I understand that argument. But I'm saying to you I don't understand it with regard to the ad buying tool there.

MR. KELLER: I see.

I believe the answer is if you use a Google ad buying tool, you have the full panoply of information that you need to submit the bid on that most valuable inventory. You don't have that information if you're bidding with a different tool.

THE COURT: But that's what Google is selling, I guess. What's inherently wrong with that?

MR. KELLER: This goes back to our discussion about hashing of IDs. The publishers own the information about the impressions that they are giving and they should be able to communicate that freely, particularly for the 20 percent of

impressions that are the most valuable and that mean the most to them in terms of revenue.

And so these things are all interlocking forms of anticompetitive behavior. You have the hashing of IDs, which gives information disadvantages, and then you have a manipulation that forces the best inventory of the publishers onto Google's exchange where only the Google ecosystem can see it. And so that's how this builds on top of the previous misconduct that we talked about.

THE COURT: Where am I getting from your complaint that if I use a different ad buying tool and I participate in an AdX auction, that there's some item of information that I'm not getting? I will confess, I missed that. So if you could point me to that, I would appreciate it.

MR. KELLER: I hopefully can in a minute.

THE COURT: Sure.

MR. KELLER: Let me get paragraph numbers for you.

THE COURT: Sure.

In the meantime, let me invite Mr. Mahr if he wants to respond.

MR. MAHR: I don't think it has anything to do with the ad buying tools. The only way AdX wins under DA or EDA is if it has the highest bids. So nobody is being forced. It's just the but-for world, before dynamic allocation and enhanced dynamic allocation, is the inventory would have been sold at

the static price. Google just said, We have this reservoir of real-time bids over here. Shouldn't we see if there's a way to just check that before we sell it, because there might be a higher bid in the real-time reservoir.

THE COURT: I get that argument. Let's not look at what the rival exchanges are bidding, because they could be higher than a penny more than the historical. Let's just look at the historical. I got it.

MR. MAHR: We figured out to do ours first. It's not let's not look at our competitors. It's not surprising that we figured out how to do that with our own ad exchange. To figure out how to make these connections with other ad exchanges — and this is why forced sharing and forced duty to deal is so harmful — would require us to understand, How does your ad server work? How can we get more communication between your tools and our tools?

We figured out how to do it first with our tools. To say we had to hold back that innovation until we figured out how every competitor out there could do it with their tools also I don't think is required under the antitrust laws.

THE COURT: I've got the argument. Go ahead.

MR. KELLER: I won't respond, I'll just give you paragraph numbers. Paragraphs 261 and 266.

THE COURT: Okay. Thank you very much.

Now we're going to take three at once: Project

Bernanke, the Bell variation of Project Bernanke, and Global Bernanke. And if you haven't read the complaint lately, they actually are three different things, or at least Bell seems to be different than Project Bernanke. But, in any event, let me hear from the defendant first.

MR. MAHR: So, your Honor, there may be three different things, but they are three different ways of doing the same thing, which is essentially a buy-side bidding optimization. It's a pricing tool. It helps Google optimize bids that it is placing on behalf of its advertisers on its exchange to try to get more transactions to go through at higher monetization rates, at higher prices. It's internal pricing on Google's tools; and it only affects the price of the auction on Google's tools. And it only has an effect if it gets the publisher more money.

This is essentially an internal pricing algorithm internal to Google's tools. It works for Google's products. There's no obligation to make it work with respect to rivals.

This is *LinkLine* again, where Chief Justice Roberts said, If there's no duty to deal in the first place, there's no duty to deal under the terms and conditions or preferences of the rivals if you do invite them onto your platform.

THE COURT: All right.

MR. KELLER: So if you zoom out for just a second, when you manipulate auctions and your marketplace is built

around auctions, and you don't tell people the rules of the auctions, it's going to stifle competition. It's, again, not about opening up your secret sauce, the recipe for your secret sauce to your rivals; it's making sure that customers have the ability to conduct these auctions in a way that is going to maximize their needs and wants, revenue on the publisher side and access to the right advertisements on the advertiser side. And all three of these programs introduce a year apart are classic auction manipulation, just like in the *Merced* case, for example, or the *Barclays* case.

So the Bernanke program, named for Helicopter Ben, as he was sometimes called, for dropping money out of helicopters, is essentially Google saying, Where we can get away with it, we're going to change from a second price to a third price auction without telling the participants in the auction. And we're going to give that third price to the publishers and keep the second price for ourselves, which could be a very big delta. That's going to essentially be our slush fund so that in other auctions where our advertisers on our tools aren't necessarily going to win the auction, we'll top them up a little bit to make sure that the competitor doesn't win the auction.

And you might say on that isolated auction, that one particular auction, Hey, we did our advertisers a favor. We actually made them win when they would have lost. But when you

multiply the effects of this over billions of auctions where you're taking over here, where you can get away with it, and building a fund with your customers' own money to make sure the competitors don't win auctions over here, and they don't know that they've actually lost on these unfair terms, they just think Google somehow is always winning these auctions, it must be a better product, when that's not true, it's just this manipulation that's transpiring.

Dynamic revenue share is another form of auction manipulation. You're adjusting your fees after the auction is over, but you're privileging yourself to be the only one to do that. So if a different rival would have won the auction, when you account for the commission that's charged — and Google charges a super-competitive price commission that's four times above what rivals are able to charge, which demonstrates its market power over the exchange — Google then says, after the auction is done and all the bids are in, We'll adjust our price so that we can win this and our rival won't. But we're not going to make that known; we're not going to tell the rivals, Hey, if you want to adjust your price, you'll have another chance to do so and maybe win this impression. And again, you multiply the effects of that over all of these billions of auctions, and rivals start to think, Man, we can't compete. We're not winning enough of these transactions.

Same thing with preserved price optimization, which

was the third version of Bernanke that you wanted to talk about. It's just overriding the publisher's own choices about what they're willing to accept for their own inventory. Why would any monopolist just in the server market do that? You wouldn't. You'd say, Set whatever reserve price you want. You know best what you're able to sell this for. It's to manipulate, once you're in the exchange, once again, so that rivals aren't able to compete.

Publishers got wise to what Google was doing. They couldn't totally figure it out; Google stifled the information that was provided to publishers. But they started to realize, something is fishy here. So we're going to send our reserve prices out in different ways to different exchanges, because we have a sense to maximize our own revenue that this is going to be best for us. And Google's artificially — unbeknownst to them — saying, No, we're going to change your reserve prices for our own benefit. Once again, harm to competition not by Google refusing to share Google's innovations with its rivals, preventing its customers from choosing whether to work with rivals.

THE COURT: Talk to me about *Merced* and *Barclay*.

MR. KELLER: Classic auction manipulation. It was in the electricity market.

THE COURT: This is *Merced* now or *Barclay*?

MR. KELLER: *Merced*, sorry. I think those are the

same case that --

THE COURT: *Merced*.

MR. KELLER: I gave you both sides of the V without saying that there was a V.

THE COURT: I see.

MR. KELLER: Barclays is the defendant.

THE COURT: Okay.

MR. KELLER: And it was a manipulation of the electricity market. And essentially, Barclays was submitting bids that would lose Barclays' money in particular auctions for electricity in order to help swap contracts that they had on the side, and foreclosing competitors who would have actually bid on the electricity for legitimate purposes. And that was found to be actual misconduct under Section 2.

This I think is actually far, far worse misconduct in terms of auction manipulation. It's far more sophisticated, and the scheme is more difficult to detect by competitors, which is what you need to have the price transparency that would allow effective auctions to function.

MR. MAHR: If I can address *Merced*, your Honor.

First of all, it's not an auction case, it's an index case. And it's not about the operator of the index making changes to the way the index works. It's about a third party to the index, Barclays, making what Mr. Keller just admitted were predatory transactions on it in order to manipulate the

index.

Our case involves Google making changes to its own algorithms, it's own AI on its own exchange in order -- as Mr. Keller said it, think about adjusting your fees to win the auction. That's the essence of price cutting, and that's what we're doing. We found these algorithms that can do it in a billionth of a second. There's nothing wrong with that. And if there were, the remedy would have to be -- and I really do think remedy in Section 2 cases is a good way of seeing kind of how hollow the claim is.

The remedy would be either, Google, you can't cut your price, you can't cut your take rate in order to win that transaction and give the publisher more money for its product. You have to keep your price static, or you have to figure out how the innovations that you used through Bernanke can apply to your competitors when those competitors are visiting your auction, which you don't have to let them there in the first place.

THE COURT: Okay. Thank you.

I think we're talking about much the same stuff, dynamic revenue sharing. This is a downward adjustment to the fees to cause a bid to clear, but would increase AdX's fees if the bid was significantly above the publisher's floor.

And again, this may be an overlapping question, where do you claim the harm is? I want to start with the plaintiff

on this. What market do you claim the harm is in?

MR. KELLER: These are manipulations happening in the exchange. So it's definitely harm to rival exchanges.

I'm going to do the same thing I did before and get you the paragraphs for the small buying tools where we also allege anticompetitive harm. Sorry, to be very clear, only with respect to Bernanke.

THE COURT: So in Bernanke, you're claiming it's -- yes, you're claiming it's anticompetitive in the market for ad buying tools for small advertisers.

MR. KELLER: Correct.

That's paragraph 315, your Honor.

THE COURT: And dynamic revenue sharing.

MR. KELLER: The exchange.

THE COURT: In the exchange. Okay. Thank you.

All right.

MR. MAHR: May I speak on dynamic revenue share?

THE COURT: Sure.

MR. MAHR: Important point. "Dynamic" means changing, "revenue share" means what Google charges the publisher. It means we change our price depending on the transaction. There is nothing in antitrust law that compels a competitor, even an alleged monopolist, to price in any particular way. You cannot cut your price here, you cannot raise your price here. There's nothing in antitrust law. It's a made-up claim, and there's

nothing anticompetitive about dynamic revenue share in the first place.

THE COURT: Reserve price optimization. This is increasing the price paid by an advertiser by allegedly artificially raising the publisher's floor price. And the claim is that dynamic revenue sharing and reserve price optimization work together and had a synergistic effect.

What can you tell me about reserve price optimization that you haven't already told me about as to the other markets? Which is fine, if that's the answer.

MR. MAHR: There is a common theme here, but reserve price optimization is just doing the same thing.

The reason Google is in this business is to get more money to publishers. Publishers have money because they monetize their content; they keep their websites open, they don't go behind paywalls. Google likes an open internet because it has a search engine that relies on an open internet.

Reserve price optimization, like all of these other optimizations, are just ways in which Google makes more transactions clear at a higher level on its own exchange. It doesn't affect anything that happens on competing exchanges. They can run their exchanges any way they want. When they are on our exchange, we have certain algorithms and we have certain bidding strategies that help our advertisers buy inventory from publishers at a higher rate. That's a good match for everyone.

THE COURT: Well, it may not be so great for the advertiser, right?

MR. MAHR: Well, I would say it's a balance, right, and that's probably why there are advertisers who want to sue us and publishers who want to sue us, because they say, He charged us too much money. We want to pay less. Advertisers want to pay less for ads, publishers want to pay -- get more for ads. Google tries to balance it and runs its auction in a certain way.

THE COURT: Yes, but you're artificially -- "artificially" meaning it wasn't done by the publisher. You, Google, are raising the publisher's floor price. And if you left it the heck alone, the advertiser wouldn't be paying as much as it's paying.

Now, you might say, Well, that's harm to an advertiser; it's not harm to competition, and I'm all ears. But the advertiser is paying more because Google has artificially raised the publisher's floor, according to the allegation. Again, it could be a pack of whatever, but that's what it says.

MR. MAHR: The advertiser is not paying more than it identified it was willing to pay for that piece of inventory. So through our ad tools, Google advertisers say, Here's the kind of ads I want to buy and how much I'm willing to pay for them, and publishers do the same thing. We try to match the

publisher to give them the highest amount of money for their inventory with the advertiser that values it highest. This is basically, in very simple terms, saying, I think this publisher is undervaluing this piece of inventory. On our auction, we're going to see if we can't get it at a higher price, which will -- is still within the advertiser's willingness to pay and get more money to the publisher.

THE COURT: I don't know. This may be a crazy question, but wouldn't that advertiser's bid clear anyway if you left the publisher's floor alone?

MR. MAHR: It would clear the lower price and the publisher would get --

THE COURT: Yes.

MR. MAHR: -- less.

THE COURT: Yes. And the advertiser --

MR. MAHR: No, the advertiser pays what it said it would pay. Google can get more.

THE COURT: No, no. The advertiser put in a bid. They put in a bid. And if Google — not you. You guys are --

MR. MAHR: I couldn't figure out how to do it.

THE COURT: -- just lawyers.

But if Google had left the price floor alone, that advertiser's bid may have cleared. That's what I'm not understanding. How did it even cause more transactions to clear? It just caused more money to go into the publisher's

pocket, which, coincidentally, if I've read this all correctly, means higher exchange fees for Google.

MR. MAHR: I think that's all correct.

The kind of transaction we're involved in is you say, I want to buy a couch. I'll give you $200. Go out and find me this kind of couch. I want it to be red, whatever.

I say, All right, I'll go out and look. It will be $200 no matter what.

If I can find it for 60, and it's exactly what you want, I say, Here's your couch for $200. And that's my commission. If I can't get one for but 199, well, I only make a dollar on that deal. There's nothing wrong with that.

THE COURT: Okay. But then I'm missing something in my reading here because I thought that the advertiser submitted a bid. They submitted a bid. They had a number. They had their number. And that the bid would have cleared maybe if the publisher's floor wasn't raised, but the floor was raised and, therefore, the bid got adjusted. Am I misunderstanding what's going on or --

MR. MAHR: I don't think it's like -- you know, *Cranberry Auction* is one of the cases they use. It's not where people raise their hand and say, Oh, I'll go up a dime, I'll go up a dollar. They put in a willingness to pay and a willingness to accept.

This is a matching market. All these allegations

about the stock exchange, it's a matching market trying to find the advertiser who most highly values the product and match them with the publisher who wants to get the most that they can for the product -- for the ad inventory. And it's matching.

There might be some exchanges that say, We're only going to try to get the lowest price. That's going to be the whole idea of our exchange, we're going to get the lowest prices for advertisers. I don't think that many publishers would go there.

There might be another exchange that say, All we're going to do is try to maximize what advertisers pay. I don't think that many advertisers would go there.

It's a tricky balance. Google comes up with its way of balancing through these various -- internal to its exchange only, its various algorithms, it's various optimizations. There are other exchanges, they can do it another way, and publishers can go to those, advertisers can go to those. But on Google's own auction, this is just the way it runs its auction.

THE COURT: Mr. Kelly.

MR. KELLER: So I want to take the couch example, because your Honor is not misunderstanding.

The allegations in the complaint are, to take that example, the advertiser bids 200, but the advertiser doesn't say, I'll pay 200 no matter what, even if you can go find it

for $10. It's supposed to be a second price auction. And so if the best price is his $200, and the next best price was $50, the advertiser should get it for 50.

But Google secretly, deceptively, without telling either side of the transaction, says, Well, because we can get away with it in this auction, we're going to raise the price all the way up to $200. So, yeah, you paid what you were willing to, the absolute maximum that you were willing to, and Google pockets a fat exchange fee because of that, but that's not a fair auction.

The deceptive conduct that runs throughout all of these Bernanke versions that we have been talking about I think is pretty powerful evidence that this isn't on the up-and-up. If you normally have a better product for advertisers and publishers, you tout it to them. You'd say, Look at what great technological progress we've made to develop an auction system that both of you want to use. Instead, they are not telling them what they are doing, which is essentially this simplified. They are engaging in maximum auction manipulation and price discrimination where they can; and then, when a particular auction comes along where they might lose it to a rival, they lower the price, they adjust things so that the rival doesn't get it.

So every time they can get away with taking the maximum price from the advertiser or the lowest possible value

to the publisher, they'll do it and they'll charge a fat exchange fee that only a monopolist can charge. And if they can't get away with it for a particular auction, we'll kill the competition, make sure that they are not going to continue to be in the marketplace successfully and keep going on our merry monopolistic way.

THE COURT: I'll give Mr. Mahr the last word.

MR. MAHR: So I should say, particularly on this one, it's true for all of them, Google contests that any of this is the way these optimizations work, but we have to take what we have in the complaint for what it is.

But I think what is happening now is that the claim is morphing into one of deception. And that is a completely different standard under the Second Circuit. It is a standard where there's a presumption of minimal harm. If an advertiser feels deceived by this, then they could bring a contract case or some other kind of case. But for it to harm competition, it's presumed to be *de minimis*. I should also point out, as we do in our briefs, they dropped deception as one of their Section 2 claims.

THE COURT: I understand.

MR. MAHR: You have the briefing, your Honor.

THE COURT: But I think there's a D.C. Circuit case which is cited, which kind of, in a rather pithy way, says deception is not actionable unless it harms competition. If it

harms competition, it's actionable under Section 2. If it doesn't harm -- if it might harm market participants, that's a different story. But if it harms competition, then it is actionable. That's kind of a simple summary of what I think the law is.

MR. MAHR: That's the law in the D.C. Circuit, and I think it's the summary of the law in general, except that in the Second Circuit there's a presumption that deception is *de minimis*. The burden is on the plaintiff to plead with 9(b) particularity the deception at issue and to show how it actually harms competition, and done none of those things.

THE COURT: And that case is?

MR. MAHR: *Michael Anthony Jewelers*, cited in our briefs. That's an S.D.N.Y. --

THE COURT: I'll find it.

It's a Second Circuit or --

MR. MAHR: S.D.N.Y.

THE COURT: All right.

So one of my pals down the hall had that thought. I've had a lot of dumb ideas along the way and I've probably put some of them in writing, too. But I'm going to take a look at it.

MR. MAHR: This is one of the brightest.

THE COURT: This is a brilliant one.

Pardon me?

MR. MAHR: This was one of the brightest.

THE COURT: That's what I thought.

I'll take a look at it.

All right. Anything from the plaintiff in response to the last comment?

MR. KELLER: The only thing I'll say on deception, your Honor, is even if it's not separately actionable as a standalone Section 2 claim, the deceptive behavior can still be taken into account to show that this isn't competition on the merits; it's not superior business acumen and skill and historical accident. So you can still look at these allegations even if you think your colleague down the hall is the most brilliant jurist ever to grace Article III.

THE COURT: All right.

Okay. Now, I'm going to give you all an option. We're going to give you the opportunity on redaction of auction data and limitations on publisher line items, Projects Perot Elmo, mobile web page development, anything, Mr. Mahr, that you want to bring fresh to the table as to any of them?

MR. MAHR: Well, none of them are anticompetitive conduct.

THE COURT: Okay.

MR. MAHR: I can go through each of them.

I think, again, with the exception of accelerated mobile pages, which it isn't even what we are doing with our

own ad tech platform, it's what we're doing with a search loading function. And the idea that Google has to figure out -- when they come up with something like accelerated mobile pages that allow mobile pages to add -- to load faster on your phone and iPad, they have to say, Hold on a second. Before we put this in, how does this work with header bidding? Because we want to make sure that those folks aren't disadvantaged in the ad tech market. Google does not have to design any of its products to take into account the interests of its rivals.

I don't know if there are other ones that you are particularly interested in. Perot -- I think Perot and Elmo are interesting. I mean, a big point here is that the plaintiffs have kind of laid out the entire history of Google's ad tech business, 15 years, and everything that Google has done, including things it hasn't done yet, like Project Sandbox. It says, It's all anticompetitive, Judge. We're not going to tell you exactly what legal framework to look in, but it's all anticompetitive. You got to let us through to discovery.

Perot and Elmo are functionalities that help Google decide where its ad buying tools will bid, outside of Google. Google's ad buying tools don't have to bid in any other auctions at all. And so we're certainly allowed to figure out which -- well, Perot doesn't like these ones because they say they are second price, but they are not. Elmo doesn't like

these ones because they allow repeated bidding against themselves. We could decide who we're going to bid on by what letter the name of the exchange starts with, but we have a sophisticated way of doing it in order to decide where we want to put our -- the publisher -- the advertiser demand we represent. And there's nothing anticompetitive about it.

MR. KELLER: Thank you, your Honor.

I was accused of not giving you a legal framework, so I'm going to give you a legal framework.

The Section 2 legal framework is straightforward. Do they have monopoly power? I think it's undisputed that at least for some of the markets that we talk about, they do. And then, do they obtain or retain that monopoly power not through superior skill, business acumen, or historical accident, that's the *Grinnell* case, but through behavior that's designed to squelch competition on the merits. That's *Berkey Photo*.

And I think with respect to this last category of misconduct aimed at killing header bidding, once again, we're showing that it's not superior skill and business acumen, based on the facts pleaded in the complaint and the inferences that should be drawn in our favor, but actual behavior designed just to kill competition.

They may be able on a Rule 56 to point to pro-competitive justifications for some of the things that they've done and say it's not really designed to quash

competition on the merits. But at this procedural posture, we get the benefits of all of the inferences under that test.

And take just one example, capping line items so you can't get the full price information from header bidding when your customer wants to receive that, that's not them saying, We don't want, you know, to help out our rivals; that's them saying, We've got a monopoly and we're going to make sure you, our customers, can't go to a disruptive new technology that could displace our monopoly. That's classic behavior designed not to compete on the merits, but to make sure that your competitors don't have a fair shake to steal business away.

THE COURT: Mr. Mahr, anything you want to add?

MR. MAHR: Just one point on line item capping, since Mr. Keller brought it up.

THE COURT: Sure.

MR. MAHR: The line item cap policies that are challenged in the complaint, the complaint admits in paragraph 391 that they were in place prior to header bidding, and they just stayed in place. So this isn't any action against header bidding. The more line items, the slower the product, the more burden on Google. It just enforces something it had already in place. And Google, again, is not obligated to take the expense of additional line items in order to make it easier for header bidding to win auctions on Google's tools.

THE COURT: All right. I think I understand the

arguments from both sides on Project Sandbox and also the question of whether conduct that is not alleged to be continuing can or cannot be the basis for injunctive relief.

What I would like to hear the parties on is with regard to laches, which is an affirmative defense. Why is it appropriate to adjudicate laches on this 12(b)(6) motion?

MR. MAHR: It's appropriate, your Honor, because it's plain on the face of the complaint that goes back to conduct that the complaint itself admits was open and notorious and announced in 2009, 2012, 2014. So you don't have to get any further discovery; they provided it for you.

There's no basis for a continuing conduct exception. They don't argue that there is -- they don't provide detail sufficient to allege fraudulent concealment. There's no reason to wait when the complaint itself lays out all the bases for laches.

THE COURT: Mr. Keller?

MR. KELLER: Thank you, your Honor.

I'm obliged to say because my colleagues from OAG are here, our principal argument is that laches can't apply against sovereigns pursuing *parens patriae* authority. You have conflicting district court decisions, neither of which are binding. We think the *Russell Stover* case is the better one.

Even if you put that to one side or you decide you don't want to resolve that, we believe you are correct, you

should not be resolving an affirmative defense like laches on the face of this 12(b)(6) motion because, contrary to my friend's statement just now, there's no way that you can say on the face of the well-pleaded complaint that they've established all of the elements necessary for this affirmative defense.

It is true that we document when the conduct first began, but under *Berkey Photo*, that's not when the cause of action accrues. This is very different than the *Facebook* case from your colleague in the District of Columbia, where it's challenging a merger and an acquisition. The anticompetitive conduct obviously accrues the moment the transaction closes. With a tying claim, for example, it doesn't obviously accrue from the moment the transaction closes because accrual under the antitrust laws depends on when there's been a substantial enough foreclosing of the marketplace. So you can't see that from the face of the well-pleaded complaint.

Continuing violations, you can see from the face of the well-pleaded complaint. I'm sticking with tying as just the example. But if you want to move to some other conduct, I'm happy to do so. As we discussed at the outset of this oral argument, we allege that they started their tie in 2009, but it continued with contracts that formalized the tie all the way through 2018. Those are continuing violations that would restart any statute of limitations clock.

I also think it's worth noting we're dealing with a

statute that Congress passed that has an express four-year limitations period with respect to money damages, that's a statute of limitations. There is no textual statute of limitations with respect to equitable relief; so you're drawing on the common law.

If you look at the *Conopco* case from the Second Circuit, which is a Lanham Act case that they reference, it looks to the common law of the states to borrow the principles of laches that would be imported into the federal statutory regime. If you do that here, at least with respect to the state of Texas, it is undisputed under the law of Texas, laches cannot apply to the sovereign.

So in addition to all of the other points, they can't establish prejudice for this equitable affirmative defense, because at least with respect to one state, they are going to have to go forward under the federal regime, if you borrow Texas law for the common law of laches, and they also indisputably have to go forward on Texas's state antitrust claims, which the Texas Supreme Court informs you mirror the federal antitrust laws; that we're going to be seeking the exact same equitable relief under that state law.

So, again, Rule 56 is going to be a different procedural posture, and I'm sure they are not going to drop this affirmative defense in their answer, we'll hear about it again, but it's not appropriate for a 12(b)(6).

THE COURT: All right. Mr. Mahr, last word on that.

MR. MAHR: We're happy for you to read *Conopco* and *American Stores* and we trust your ability to handle that.

The one thing I would say about *Berkey* is it makes the distinction between when it runs for equitable relief and when it runs for damages. Damages can be continuing; equitable relief is when the event occurred. Here, as we list in our brief, there are many events that occurred well, well before the presumptive laches period of four years.

THE COURT: Well, certainly I've enjoyed, and perhaps some members of the audience have enjoyed hearing Mr. Mahr and Mr. Keller in their excellent presentations today. Really, it's a pleasure to have you and have you so well-prepared.

But as I said, one of my opening comments were that I was going to give you an opportunity to say what you wanted to say that I might have cut you off at some point for some reason. So if there's anything else you want to say with regard to the motion or the opposition to the motion, I'll give you a chance to say it.

MR. MAHR: Thank you, your Honor.

I'll try not to overstate my welcome in that.

You mentioned the 45 different analyses you would have to go through given all of the machinations in this complaint. I don't think you need to, and I'll give you the three main reasons.

First, as I've said repeatedly, all the conduct alleged under Section 2 here — and I'm focusing on Section 2 now — takes place on Google's integrated ad tech platform. And all of the claims of anticompetitive exclusion are based not on rivals being excluded from the market at large, but from them being excluded from Google's ad tech -- integrated ad tech platform.

This is critical because the second point, the Supreme Court in *Verizon* explained in words that could be used to describe this case, "Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suitable to serve their customers."

Now, if this case were to proceed to discovery, we will contest both that Google has monopoly power and that Google's infrastructure is somehow unique. But the reason the case should not proceed past the motion to dismiss stage is even if those things were true, the Supreme Court in *Trinko* tells us that just because a competitor builds an attractive infrastructure doesn't mean it can be compelled to share that infrastructure, to share its competitive advantage with its rivals.

Third, building on *Trinko*, Chief Justice Roberts explanation in *Pac. Bell v. LinkLine*, that where, as here, an antitrust defendant has no duty to deal in the first place — and you've heard me say this several times before — it has no

duty to deal under the terms and conditions preferred by its rivals or to provide its rivals with a sufficient level of service. In other words, if Google makes the decision for business reasons to invite other exchanges onto its open bidding platform, it's under no obligation to provide that access under any particular terms at all.

But that's exactly what plaintiffs are asking you to do in this case. They want the Court to force Google to give its competitors better access to Google's products; they want the Court to force Google to share its technology to make sure its optimizations work as well with their products as they do with Google's own products; they want to essentially turn Google into an ad tech utility, where all of its innovation and investment over the last 15 years, they can come -- and instead of coming up with their own innovations, come to a court and say, We want access to theirs. Nothing under Section 2 or anywhere in the Sherman Act allows that.

It's only in the very narrow circumstances of *Trinko* and *Aspen Ski* where there can be any kind of duty to deal imposed. There's none of the circumstances like prior course of dealing or profit sacrifice are alleged here. In fact, they go out of their way to say, We do all this because we make more money. Again, we contest that. We also have the goal of making publishers more money, but they don't say anywhere that we were sacrificing profits.

Rather than address these issues and these legal impediments head-on, plaintiffs kind of hide through this 702-page third amended complaint that, as I said, gives a 15-year history of -- skewed history of Google's ad tech business and sprinkles in some conclusions about exclusion here and there. And the hope appears to be that the Court throws up its arms and says, There must be something in there.

We are so appreciative today of the care with which you've gone through the complaint and the motion. It's really very appreciative. But instead of -- I mean, they've kind of made you do the work. Instead of saying a plain, short statement of their claim, they've done everything to avoid committing to a claim. They say, Don't cost or refuse it a deal. We don't want that law because we know where that heads. And don't cause product design or exclusive dealing because we know where that goes, too.

And instead, I think they're proposing some kind of freewheeling I'll-know-it-when-I-see-it standard for anticompetitive conduct. And the case law just doesn't do this. *LinkLine* and *Trinko*, they make clear that forcing a competitor, even an alleged monopolist, to deal with its competitors, to share its competitive advantage with its rivals, is the narrowest slice of Section 2 law. And the preconditions for it just aren't here.

And my last point will be I mentioned earlier that the

way I look at Section 2 to figure out is this kind of a valid claim, one of the things that gives guidance to me when I do that is, What would the remedy be here?

So in paragraph 396 -- 369, the plaintiffs say, Well, now that you've invited us on to open bidding, and we can bid on your tools on the inventory that you've assembled together, and with the demand you've assembled together, we object that you charge us five percent to be on there.

And the remedy, I guess, would be for either the Court to say, Oh, no, you have to allow them in for free, which would make them a utility, or the Court will decide what the price is, and the Court will become a price regulator of Google.

The same thing, and we talked about it under dynamic revenue share. That's a situation where Google is adjusting its price up or down as it sees fit based on the particular circumstances of a transaction. Price cutting is the essence of competition. But companies, including alleged monopolists, are allowed to raise their prices as well. And Section 2 doesn't have anything to say about that.

So, again, presumably the only remedy there would be for the Court to say, Oh, you can't cut your prices or you can't raise your prices; you have to have a price menu that you're stuck to.

No one has ever been sued on these facts. And as I say, the result, if plaintiffs were to be allowed to prevail or

go forward, would be to turn Google into a public advertising utility, and that's just not permitted under the Section 2 case law.

Thank you.

(Continued on next page)

THE COURT: Mr. Keller.

MR. KELLER: Thank you, your Honor.

The ad tech space is a complex and interlocking set of markets. I appreciate you saying that we didn't have to have sympathy for you, but I do. I know that the complaint has a lot of materials.

So I'm going to take less time, 90 seconds, to just step back and hopefully synthesize the story that we think transpired here over the period of time that's documented in the complaint.

It starts with the tie. Google acquires DoubleClick and then gains a stranglehold through the tying arrangement over the ad server market. And it did that strategically. Because having that choke point, that access point that publishers have to utilize, is an extremely important tool that Google used through all of the series of misconduct that we allege to funnel publisher inventory into the exchange.

That's really important for Google because that's where they charge the richest fee that have the highest super competitive price, and they engaged in a series of manipulations that we talked about at length today in order to maximize that price.

It is true, as my friend just said, charging the monopoly price for even engaging in price discrimination by itself is not illegal. But as you look at all of the

misconduct that we allege, ask yourself, is that really innovation? Is that a better mousetrap? A secret sauce? Is that superior business acumen or sales tactics or skills?

It's none of those things. It's just naked anticompetitive behavior to make sure that others can't disrupt the monopoly profits that Google is enjoying. And the header bidding story is where that comes into focus. They've worked so hard to gain a monopoly in servers and to monopolize the exchange and small buying tools, and they have this ecosystem working well where they're charging extremely super competitive pricing. And along comes, as often happens in the technology space, a new disruptive technology that threatens them, that could just disintermediate them, which is just fancy tech speak for saying they are not going to be as important to the publishers and the advertisers in this ecosystem.

And what do they do? They set out to kill it. More manipulations and a horizontal agreement with Facebook, a massive, well-capitalized competitor who actually could have gotten this nascent technology off the ground and thriving, and they buy them off to make sure that they're not going to do so. That is a classic series of Section 1 and Section 2 misconduct that on a 12(b)(6) is more than sufficient to survive the motion to dismiss.

And I'll just close with this, your Honor. It's not legally dispositive, but I think it provides some color. My

friends previously answered an older version of the complaint: All the horrors of discovery that they were talking about, they were ready to go forward if this case were still in Texas. But now all of a sudden that's a problem? I think the new complaint --

THE COURT: That doesn't impact my thinking here.

MR. KELLER: Fair enough. I will leave you --

THE COURT: We are where we are, and that's all that's relevant at this stage.

MR. KELLER: I'll leave you with that thought, and I appreciate your time and attention to this complex set of issues.

THE COURT: Mr. Mahr, anything else?

MR. MAHR: Nothing else, your Honor.

Thank you very much.

THE COURT: Well, thank you again for working hard. I know there is a lot of work that goes into getting ready for this, and I appreciate it. It was helpful. And I'm glad that we were able to spend more than the time that you get at the podium in certain appellate courts, because maybe I'm not going to absorb it that quickly. So this was very helpful.

Thank you very much. I appreciate it.

(Adjourned)